In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1887 Misc.

LAWRENCE BRAICO AND RONALD ROUTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–5) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1970. A petition for rehearing en banc was denied on February 19, 1970. The petition for a writ of certiorari was filed on March 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were improperly denied a severance.

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2. Whether it was reversible error to admit post-arrest statements of petitioner Routa without a hearing out of the presence of the jury.

STATEMENT

In an indictment returned in the United States District Court for the Northern District of Illinois, petitioners Braico and Routa, together with codefendants DeMaio and Fernandez and unindicted coconspirator Garland, were charged under Count I with a conspiracy to violate 18 U.S.C. 2315 by receiving the proceeds of a jewelry store robbery committed by Fernandez and Garland. Count II charged Fernandez alone with transporting the jewelry (18 U.S.C. 2314); Count III charged DeMaio alone with receiving part of the stolen jewelry (18 U.S.C. 2315); and Count IV charged petitioners alone with receiving part (18 U.S.C. 2315) (R. 2).[1] The jury found petitioners guilty on Counts I and IV (R. 100, 101).[2] On November 15, 1968, each petitioner was sentenced to imprisonment for concurrent terms of four years on Count I and five years on Count IV, along with cumulative fines of $5,000 on Counts I and IV (R. 104). On appeal the court of appeals reversed petitioners' convictions on Count I on the ground that a conspiracy with DeMaio had not been proven. It

[1] "R." refers to the district court record; "A." to the printed Appendix of codefendant DeMaio, which is part of the record of the court of appeals on file with this Court; and "Tr." to the two-volume transcript of the trial testimony, also on file with this Court.

[2] Codefendant Fernandez entered a plea of guilty, and along with Garland was a government witness. The jury found DeMaio guilty on Count III (R. 99).

affirmed petitioners' convictions on Count IV (receiving stolen property) (Pet. App. 1–5).

1. Prior to trial, petitioners filed a motion to dismiss Count I on the ground that a conspiracy had been improperly charged, and requested that they have a separate trial on the substantive charges of Count IV (R. 6; A. 11–12). The court denied this motion (R. 49). After the government's opening statement petitioners renewed the motion to dismiss the conspiracy count (Tr. 17–19). At the close of the government's evidence, over petitioners' objection, the court instructed the jury to disregard all limitations previously imposed upon the evidence and to consider all of the evidence relating to the conspiracy count against all defendants (R. 87; Tr. 775–778).

2. Evidence at the trial showed that on August 2, 1967, Fernandez and Garland robbed a store in Iowa, and obtained jewelry valued at $70,000 (A. 18, 29). They went to Chicago to seek a buyer for the stolen goods (A. 18). DeMaio, also known as Frank Diamond, bought about one-third of the goods for $2,200; he offered to pay $3,500 for the remainder, but this offer was declined (A. 18–20). Fernandez and Garland then contacted petitioners and offered to sell them the remaining goods for $4,500 (A. 20). Petitioners told Fernandez and Garland it would be difficult for them to resell the goods if they paid $4,500 because Frank Diamond (DeMaio) had "put the word out" that he could get the remaining goods for $3,500 (A. 20–21). Nonetheless, after further bargaining, petitioners purchased the goods for $4,500 (A. 21; Tr. 449).

ARGUMENT

1. Petitioners argue that, in light of the reversal of the conspiracy count, the court below should have found that the district court committed prejudicial error in failing to grant their pretrial motion to dismiss the conspiracy count (Pet. 27–29) and in failing to grant their motion for a severance (Pet. 8–19). As the court below pointed out, however, in this case the allegations with respect to the substantive count were simple and the proof of guilt "unusually clear" (Pet. App. 4). Although at the close of the government's evidence the court instructed the jury to consider all of the evidence relating to Count I (conspiracy) against all defendants (R. 87; Tr. 775–778), the court also gave separate instructions relating to the guilt or innocence of DeMaio under substantive Count III (R. 102, Gov. Inst. 55) and of petitioners under substantive Count IV (R. 102, Gov. Inst. 56). In addition, the court instructed (R. 103, DeMaio's Inst. G):

> Defendants have been charged with separate crimes in the various counts of the indictment. The jury should give separate consideration and render separate verdicts with respect to each defendant, and to each count. Each defendant is entitled to have his guilt or innocence as to each of the crimes charged determined from his own conduct and from the evidence which applies to him as if he were being tried alone. If the jury finds that a defendant is guilty beyond a reasonable doubt of any one of the crimes charged in the indictment a verdict of guilty should be returned as to him. The

guilt or innocence of any one defendant of any of the crimes charged should not influence the jury's verdicts respecting the other defendants. The jury may find any one or more of the defendants guilty or not guilty.

Petitioners' assertion that prejudice resulted from the joinder of counts and defendants (Pet. 16–19) is strained and unconvincing. Petitioners point to testimony by Fernandez, on cross-examination by counsel for DeMaio, that Fernandez first met Braico in the Cook County jail (Pet. 16); however, the matter was not pursued further and the witness did not say why Braico was at the jail, nor even that Braico was incarcerated. The only other allegedly prejudicial result of the joinder was a statement that DeMaio was thought to be associated with the syndicate (Pet. 18), but this could not be prejudicial since the evidence was that petitioners were bidding against DeMaio for the stolen goods.

2. FBI agent Miller testified that on March 29, 1968, he and other agents arrested Routa at his apartment (Tr. 701–703). Routa's wife read to him the FBI form setting forth a defendant's rights and the waiver of rights (Tr. 733, 737). When Routa was taken from the apartment to FBI headquarters, the form was shown to Routa, but he did not sign it (Tr. 719–720). When Routa was advised of the charges against him, he told the agent he "knew nothing about any armed robbery or the transportation of any jewelry or the possession of any jewelry" (Tr. 716). Routa identified a photograph of Braico and stated that he had known him since 1957; he

identified a photograph of DeMaio and said he had not seen him for ten years (Tr. 726–728). Requests by petitioners' counsel for a voir dire hearing out of the presence of the jury as to post-arrest statements made by Routa were denied (Tr. 714–715, 720–721, 723). The court also denied petitioners' motion to strike the testimony of Agent Miller described above, and a motion for a mistrial (Tr. 747–748).

While Routa should have been given a hearing on voluntariness at his request, Agent Miller's recounting of his statement that he knew nothing of the charges against him and his admission that he knew Braico and DeMaio added no weight to the proof on the substantive count. Since, in addition, he was clearly warned of his rights before he made the statements, the failure to hold the hearing was not prejudicial under the standard of *Chapman* v. *California,* 386 U.S. 18, 24.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970